



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Objection of the Sheboygan
County Conservation Association to the Slow-No-
Wake Ordinance Number 3 of 2001, for Personal
Watercraft on Lake Ellen Enacted by the Town of
Lyndon in Sheboygan County, Wisconsin

Case No.: IH-02-07

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On July 18, 2001, the Town of Lyndon submitted a proposed boating ordinance to the Department of Natural Resources. The proposed ordinance requires personal watercraft to operate at a slow-no-wake speed limit on Lake Ellen. The Department of Natural Resources assigned this proposed ordinance number 719. After review, the Department of Natural Resources found the ordinance to be discriminatory and that it would not promote public safety. On August 21, 2001, the Town of Lyndon Town Board adopted ordinance number 719.

The Department of Natural Resources subsequently received a request for hearing from Michael J. DeMaster, on behalf of the Sheboygan County Conservation Association, objecting to ordinance number 719. The request for hearing is dated August 9, 2002. On September 5, 2002, the Department filed a Request for Hearing in this matter with the Division of Hearings and Appeals.

Pursuant to due notice a hearing was held on October 4, 2002, in Sheboygan, Wisconsin, Mark J. Kaiser, Administrative Law Judge, presiding.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Sheboygan County Conservation Association, by

Michael J. DeMaster, president
1515 519th Street
Sheboygan, WI 53081

Town of Lyndon, by

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Wisconsin Department of Natural Resources, by

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FINDINGS OF FACT

1. The Town of Lyndon is located in Sheboygan County. Lake Ellen is entirely within the jurisdiction of the Town of Lyndon. Lake Ellen is approximately 121 acres in size with a maximum depth of 42 feet. Lake Ellen is navigable in fact.

2. Buoys have been placed in the near shore area around the perimeter of Lake Ellen. The effect of the placement of the buoys is to establish a slow-no-wake speed limit for motorboats within 100 feet of the buoyed area and for personal watercraft (PWC) within 200 feet of the buoyed area. Wis. Stat. § 30.66

3. On July 18, 2001, the clerk of the Town of Lyndon (Town) filed with the Wisconsin Department of Natural Resources (Department) a copy of a proposed ordinance (Exh. 3). The proposed ordinance establishes a slow-no-wake speed limit for PWC on Lake Ellen. The proposed ordinance was submitted to the Department pursuant to the procedures for a local government to enact boating ordinances for bodies of water within the jurisdiction of the local government pursuant to Wis. Stat. § 30.77(3). The Department assigned the proposed ordinance number 719. The Town also submitted to the Department a “condition report” (Exh. 2) in support of ordinance number 719 and as required by Wis. Stat. § 30.77(3)(d).

4. After reviewing the proposed ordinance and condition report, the Department staff determined that ordinance number 719 was discriminatory because it imposed a speed limit that only applied to PWCs and because the ordinance would not, in the opinion of Department staff, promote public safety. The Department informed the Town of its determination in a letter dated July 26, 2001 (Exh. 13).

5. On July 19, 2001, the Town published notice of a public hearing on ordinance number 719. The public hearing was conducted on August 21, 2001. On August 21, 2001, the town board of the Town of Lyndon (Town board) adopted ordinance number 719. The Town board complied with the procedural requirements of Wis. Stat. § 30.77(3) in adopting ordinance number 719.

6. By letter dated August 9, 2002, Michael J. DeMaster, on behalf of the Sheboygan County Conservation Association, filed a request for hearing with the Department objecting to ordinance number 719. The Sheboygan County Conservation Association is a “local entity” as defined at Wis. Stat. § 30.77(3)(dm)1.b., and has standing to object to the ordinance.

7. In adopting ordinance number 719 the Town board considered evidence that the operation of PWCs is more destructive to environmentally sensitive areas of the lakebed such as

fish spawning habitat because the propulsion of PWCs is generated by a jet stream emitted from the rear of the craft in a downward direction. The jet stream of water propelled downward toward the lakebed disturbs the sediment and dislodges vegetation on the lakebed to a greater extent than propeller driven motorboats. The Department witnesses disputed this evidence. Additionally, a representative of a group of manufacturers of PWCs testified that the jet stream is actually aimed parallel to the water surface and is not any more destructive to the lakebed than propellers from conventional motorboats.

If PWCs cause more environmental damage than conventional motorboats it is apparently more a function of the ability of PWCs to navigate in shallower water depths than the manner of propulsion. PWCs have the ability to access more sensitive areas of water bodies than do other motor boats and, therefore, the potential to negatively impact these areas. This concern is not significant on Lake Ellen because of the buoys that ring the near shore area of Lake Ellen. The existence of the buoys establishes a slow-no-wake speed limit for PWCs within 200 feet of the buoys. A Department employee testified that there is no emergent vegetation in the high-speed area of Lake Ellen.

8. Another factor that prompted the Town board to adopt ordinance number 719 is a public safety concern. The Town cited a Department publication that contained statistics indicating that the number of boating accidents and injuries involving PWCs is disproportionately greater than the number of PWCs registered (Exh. 15). The Town also cited A National Transportation Safety Board “Safety Study” for the proposition that PWCs are inherently more dangerous than other watercraft (Exh. 6). The cited statistics are inconclusive. The objectors to ordinance number 719 argue that the statistics are misleading because PWCs are operated more hours on average than motorboats.¹

However, even if these statistics are interpreted as showing that PWCs present a greater safety concern than other watercraft, there is no evidence of any factors specific to Lake Ellen that would justify ordinance number 719. (For example, the National Transportation Safety Board study also concluded that typically operators of PWCs have less training and experience than operators of other types of recreational boats. This is particularly true of operators of rented PWCs (Exh. 6, page 56). Lack of training and experience among PWC operators is a significant factor in boating accidents involving PWCs. However, there is no indication that any PWCs operated on Lake Ellen are rented.) Other than the state and national boating statistics, the Town did not present any evidence of safety problem specifically related to PWCs on Lake Ellen. Mark Pearce, a Department conservation warden responsible for the portion of Sheboygan County including Lake Ellen, testified that he has never investigated a reportable boating accident on Lake Ellen. Other than by simply resulting in fewer watercraft operating on Lake Ellen, there is no basis to find that ordinance 719 will increase public safety on Lake Ellen.

¹ In its study the National Transportation Safety Board states that “The Safety Board could not determine whether PWC are over-represented [in boating accident statistics] when compared to other types of recreational boats or if usage type varies by type of boat because accurate data on usage and exposure time for different types of recreational boats are not available.” Exh. 6, page 5.

9. Based on petitions filed with the Department along with the conditions report, it appears that the majority of property owners abutting Lake Ellen support ordinance number 719. A town has authority to enact a local boating ordinance as long as it does so in accordance with the procedure set forth at Wis. Stat. § 30.77 and the local ordinance is not contrary to or inconsistent with the provisions of Wis. ch. 30.² Ordinance number 719 is contrary to the provisions of Wis. Stat. ch. 30 because it establishes a speed limit for one type of watercraft without the speed limit being related to public health, safety, or welfare on Lake Ellen.

APPLICABLE LAW

Wis. Stat. § 30.77(1) provides in relevant part:

Local regulation prohibited; exceptions. Sections 30.50 to 30.71 shall be uniform in operation throughout the state. No municipality, public inland lake protection and rehabilitation district or town sanitary district may:

. . .

(b) Except as provided in subs. (2) and (3), enact any ordinance or local regulation that in any manner excludes any boat from the free use of the waters of this state or that pertains to the use, operation or equipment of boats or which governs any activity regulated by ss. 30.50 to 30.71.

Wis. Stat. § 30.77(2) provides:

Ordinances conforming to state law. Any municipality may enact ordinances which are in strict conformity with ss. 30.50 to 30.71 or rules of the department promulgated under those sections.

Wis. Stat. § 30.77(3)(a) provides:

Any town, village or city may, in the interest of public health, safety or welfare, including the public's interest in preserving the state's natural resources, enact ordinances applicable on any waters of this state within its jurisdiction if the ordinances are not contrary to or inconsistent with this chapter and if the ordinances relate to the equipment, use or operation of boats or to any activity regulated by ss. 30.60 to 30.71. (ac) Except as provided under s. 33.455 (3)

Wis. Stat. § 30.77(3)(d) provides:

Ordinances pertaining to the equipment, use or operation of boats on inland lakes shall be subject to advisory review by the department as provided under this paragraph. Proposed ordinances subject to review under this paragraph shall be

² The Town presented evidence of a similar boating ordinance adopted by the Town of Presque Isle (Exh. 4). There is no indication that the Presque Isle ordinance was adopted pursuant to a local government's authority under Wis. Stat. § 30.77(3)(a).

submitted by the local town, village or city clerk or by the public inland lake protection and rehabilitation district or town sanitary district to the department at least 60 days prior to final action thereon by the town, village, city or district governing body. Advisory reports regarding town, village, city, lake district or town sanitary district ordinances that regulate the equipment, use or operation of boats on inland lakes shall be based on consideration of the effect of the ordinance on the state from the standpoint of uniformity and enforcement and the effect of the ordinance on an affected town, village, city, lake district or town sanitary district in view of pertinent local conditions. Advisory reports shall state in what regard such ordinances are considered consistent or inconsistent with this chapter as to public health, safety or welfare, including the public's interest in preserving the state's natural resources, and shall be accompanied by suggested changes, if any. No later than 20 days after receipt by the department of proposed ordinances, the department shall advise the town, village, city, lake district or town sanitary district in writing as to the results of its advisory review under this paragraph. The department shall address the results sent to a town, village or city to its clerk.

Wis. Stat. § 30.77(3)(dm)2 provides in relevant part:

If the department or a local entity objects to an ordinance enacted under par. (a) . . . on the grounds that all or a portion of the ordinance is contrary to or inconsistent with this chapter, the procedure under subd. 2r. shall apply.

Wis. Stat. § 30.77(dm)2r. provides:

a. Upon receipt of an objection under subd. 2. or 2g., the department shall order a hearing on the objection under ch. 227. The hearing shall be a contested case hearing, and the administrator of the division of hearings and appeals in the department of administration shall assign a hearing examiner to the hearing as provided ins. [227.43](#). Persons who are not parties to the contested case may present testimony and evidence at the hearing.

b. The hearing examiner shall issue an order on the objection within 90 days after the date on which the hearing is ordered under subd.2r. a.

c. For an objection under subd. 2., if the hearing examiner determines that the ordinance or the portion of the ordinance is contrary to or inconsistent with this chapter, the hearing examiner shall issue an order declaring the ordinance or that portion of the ordinance void. For an objection under subd. 2g., if the hearing examiner determines that the ordinance or the portion of the ordinance is not necessary for public health, safety, welfare or the public's interest in preserving the state's natural resources, the hearing examiner shall issue an order declaring the ordinance or that portion of the ordinance void. An order issued under this subd. 2r. c. shall prohibit the enforcement of all or any portion of the ordinance declared to be void.

DISCUSSION

Wisconsin Stat. § 30.77(3)(dm) provides that the Department or a local entity can object to a local boating ordinance “on the grounds that all or a portion of the ordinance is contrary to or inconsistent with [ch. 30].” The Town argues that this means that the scope of the hearing in this matter is limited to considering whether the Town followed the procedures for adopting a local boating ordinance set forth in Wis. Stat. § 30.77(3) and whether the Town adopted the ordinance in the interest of public health, safety or welfare. If it is found that the Town acted in the interest of public health, safety or welfare, the Town argues that the Department cannot substitute its judgment for that of the local officials. In other words, the issue is whether the Town adopted the local boating ordinance for reasons consistent with ch. 30, not whether those reasons are valid. This interpretation may be supported by a narrow reading of the statute; however, it is not supported by the case law interpreting the statute.

The Wisconsin Supreme Court considered the validity of Wis. Stat. § 30.77 in its decision in *Menzer v. Elkhart Lake*, 51 Wis. 2d 70, 186 N.W.2d 290 (1971). In considering whether the delegation under Wis. Stat. § 30.77(3) is an unconstitutional delegation of the State’s trust powers over navigable waters, the court stated that the standards prescribed in Wis. Stat. § 30.77(3) constitute adequate protection of the public interests. The court stated “[h]ere the safeguarding of the public interest and the trust are sought legislatively to be ensured by three requirements: That the ordinance, enacted pursuant to sec. 30.77(3), be (1) a local regulation; (2) in conformity and not inconsistent with the statute; and (3) in the interest of public health and safety.” *Menzer*, 51 Wis. 2d 70, at 84.

The court in *Menzer* was reviewing two local boating ordinances that barred powerboats on Sundays. In affirming the trial court’s denial of a motion for a summary judgment, the court agreed with the trial court’s holding “that whether the exclusion of powerboats on a summer Sunday from Elkhart Lake did further the interest of public health and safety raised substantial and material questions of fact.” *Menzer*, 51 Wis. 2d 70 at 80. In determining whether a local boating ordinance met the standards for Wis. Stat. § 30.77(3), the court did not find that the standard was met if the local officials adopted the ordinance in the interest of public safety, health or welfare; but, rather whether the ordinance “did further the interest of public health and safety.” Thus, the issue of whether the local boating ordinance is in the public interest is an issue to be decided at the hearing, not simply whether the local boating ordinance, in the opinion of the local government officials, is necessary to protect the public interest.

In the instant case, the Town did adopt the local boating ordinance because of concerns about damage to the environment from PWCs and other public safety concerns. Based on the evidence presented at the hearing, these concerns are unfounded. Due to the ringing of the lake by buoys, PWCs are already prohibited from operating at a greater than slow-no-wake speed in the environmentally sensitive near shore areas of Lake Ellen. There is also no record of any boating accidents involving PWCs on Lake Ellen. Enforcement of already existing state boating rules will ensure that PWCs are not operated in a manner that jeopardizes public health, safety, or welfare on Lake Ellen.

It is acknowledged that the majority of property owners abutting Lake Ellen are in favor of the slow-no-wake speed limit for PWCs on Lake Ellen. However, under the public trust

doctrine, all navigable waters of the state are held in trust for the public. This includes not only owners of property abutting Lake Ellen, but also members of the public who can access Lake Ellen via the public boat ramp. A local boating ordinance which imposes a slow-no-wake speed limit for only PWCs is contrary to and inconsistent with the standards for enacting local boating ordinance set forth at Wis. Stat. § 30.77(3) and the public interests provisions of Wis. Stat. ch. 30 in general unless such an ordinance is necessary to protect the public health, safety, or welfare. The evidence in the record does not support such a conclusion in this matter.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders in review of ordinances promulgated under Wis. Stat. § 30.77(3) pursuant to Wis. Stat. §§ 30.77(dm)2r. and 227.43.

2. A town, village or city may, in the interest of public health, safety or welfare, including the public's interest in preserving the State's natural resources, enact ordinances that are not inconsistent with Wis. Stat. ch. 30. Wis. Stat. § 30.77(3)(a).

3. The authority of a town board to enact a boating ordinance is limited to the authority derived from Wis. Stat. § 30.77(3). A local boating ordinance not enacted in compliance with the procedures set forth in Wis. Stat. § 30.77(3) or is contrary to or inconsistent with Wis. Stat. ch. 30 is not valid. The Town of Lyndon complied with the statutory procedures for adopting a local boating ordinance. However, based on the evidence in the record, a slow-no-wake speed limit applying only to personal watercraft is not in the interest of public health, safety, or welfare. Ordinance 719 is contrary to and inconsistent with the provisions of Wis. Stat. ch. 30 and is, therefore, invalid.

ORDER

Ordinance number 719 adopted by The Town of Lyndon is contrary to and inconsistent with the provisions of Wis. Stat. ch. 30 and is, hereby, declared void.

Dated at Madison, Wisconsin on November 5, 2002.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
Mark J. Kaiser
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53 to insure strict compliance with all its requirements.